BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Order Instituting Investigation on the Commission's Own Motion into the Rates, Operations, Practices, Services and Facilities of Southern California Edison Company and San Diego Gas and Electric Company Associated with the San Onofre Nuclear Generating Station Units 2 and 3.	I.12-10-013 (Filed October 25, 2012)
And Related Matters.	A.13-01-016 A.13-03-005 A.13-03-014 A.13-03-013

OPENING COMMENTS OF THE OFFICE OF RATEPAYER ADVOCATES ON THE PROPOSED DECISION RELATING TO PHASE 1 ISSUES

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OPENING COMMENTS OF THE OFFICE OF RATEPAYER ADVOCATES ON THE PROPOSED DECISION RELATING TO PHASE 1 ISSUES

I. INTRODUCTION & SUMMARY OF RECOMMENDATIONS

Pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure, the Office of Ratepayer Advocates (ORA) submits these Comments to the Proposed Decision (PD) of Administrative Law Judges Darling and Dudney, relating to the reasonableness of the 2012 expenses charged to the ratepayers of Southern California Edison Company (SCE or Edison) and San Diego Gas and Electric Company (SDG&E) following the cessation of generation at San Onofre Nuclear Generating Station (SONGS).

The PD recommends refunds of approximately $94 million.[1] ORA does not necessarily agree with the resolution of all matters mentioned in the PD; these Comments address only the areas in the PD where there are legal, factual, or technical errors.

[1] PD, p. 2.

II. BACKGROUND

On November 1, 2012, the Commission issued this OII to investigate the ongoing shutdown of nuclear generation at the SONGS. In January 2013, the Assigned Commissioner and Administrative Law Judge issued a Scoping Memo that detailed a list of the issues for consideration, and assigned them to various phases of the OII proceeding. Phase 1 is to consider the incremental consequential costs of the outages in 2012 and whether it was reasonable for the utilities to incur them.[2]

III. LEGAL ISSUES

The PD in this Order Instituting Investigation (OII) says that "… the standard of review for rate recovery is the preponderance of the evidence."[3] This is legal error.

Phase 1 of this OII is both a continuation of the SCE and SDG&E Test Year (TY) 2012 General Rate Cases, and a reasonableness review.[4] On both counts, therefore, the correct standard of review is "clear and convincing evidence."

In General Rates Cases, the Commission has variously held that the standard the Applicant must meet is "clear and convincing evidence"[5] or "preponderance of the evidence."[6] The last thorough analysis of the rationales for the different standards that ORA is aware of was included in a decision the Commission issued in the TY 2000 PG&E General Rate Case. That analysis included a detailed review of previous Commission decisions on rate increase requests going back to 1941.[7] In the course of this review, the Commission found that, since at least 1952, the Commission has held that "... a utility seeking an increase of rates has the burden of showing by clear and convincing evidence that it is entitled to such increase."[8]

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[2] *See* 5 RT 1011.

[3] PD, p. 13.

[4] As the PD itself says: "Phase 1 is in essence a ratesetting action…." (PD, p. 13) "In addition, Phase 1 considers the reasonableness of the various identified 2012 costs…. (PD, p. 11.)

[5] *Alternate Decision of President Peevey on Test Year 2009 General Rate Case for Southern California Edison Company (*3/17, 2009*)* D.09-03-025, p. 8 (SCE TY 2009 GRC).

[6] *Application of PG&E for Authority to Increase Rates and Charges for Electric and Gas Service (PG&E TY 1999 GRC)* (2000) 2000 Cal. PUC LEXIS 239; D.00-02-046, mimeo, p. 36

[7] *Application of PG&E to Increase Rates and Charges for Electric and Gas Service Effective on January 1, 1999* (PG&E TY 1999 GRC) (2000) D. 00-02-046, §4.4.4, "Burden of Proof and Evidentiary Standard."

[8] *Southern Counties Gas Company of California* (1952) 51 CPUC 533, 534; D.46876.

D.00-02-046 was challenged on rehearing by both The Utility Reform Network (TURN) and Pacific Gas & Electric (PG&E) on grounds relating to the clear and convincing standard of proof. TURN challenged a Conclusion of Law that said a utility only had to "generally support its application through clear and convincing evidence," when it should have said that a "utility must support every part of its application with clear and convincing evidence."[9] PG&E argued that the appropriate standard of proof was "a preponderance of the evidence."

D. 01-10-031 modified the Conclusion of Law consistent with TURN's position noting that:

> [W]e have historically, although not wholly consistently, applied the clear and convincing burden of proof to utilities seeking general rate increases. We applied the clear and convincing standard to PG&E in this case. This standard is applicable to all aspects of PG&E's showing.[10]

In so doing, the Commission said:

> We must insist upon PG&E demonstrating for each component of its proposed revenue requirements, that it produce clear and convincing evidence. To the extent it fails do, we cannot grant the requested revenue increase.[11]

D.01-10-031 appears to be the last time the Commission included a thorough legal analysis of the standard of proof in a General Rate Case decision, and in that decision, the Commission concluded that the proper standard is clear and convincing evidence. "'Clear and convincing evidence' is proof by evidence that is clear, explicit and unequivocal, that is so clear as to leave no substantial doubt; or that is sufficiently strong to demand the unhesitating assent of every reasonable mind."[12]

The Commission affirmed this long-standing rule in its 2004 decision in SCE's TY 2003 GRC:

> ORA reminds us that SCE must meet the burden of proving by clear and convincing evidence that it is entitled to the relief it is seeking in this proceeding, and that the burden is not on ORA or

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[9] *Order Granting Rehearing of and Modifying Decision 00-02-046* (2001*)* D.01-10-031, 2001 Cal LEXIS 917 *3.

[10] *Order Granting Rehearing of and Modifying Decision 00-02-046* (2001*)* D.01-10-031, 2001 Cal LEXIS 917 *6.

[11] D.01-10-031, 2001 Cal LEXIS 917 *6.

[12] D.00-02-046, §4.4.4, "Burden of Proof and Evidentiary Standard."

> other intervenors to demonstrate that SCE's request is unreasonable. We intend to hold SCE to this standard as we examine individually myriad components of SCE's request.[13]

In a 2008 decision addressing arguments on rehearing in the Sunrise Powerlink case, the Commission decided not to apply the clear and convincing standard to that Certificate of Public Convenience and Necessity proceeding, but said:

> Moreover, we adequately explain in the Decision that *the clear and convincing standard has generally been limited to general rate cases and reasonableness reviews which are specialized proceedings*.[14]

But then, in 2009, the Commission inexplicably departed from this long line of precedent, and applied a "preponderance of the evidence" standard to an SCE General Rate Case. No explanation was given in the Edison decision for this change in standard, and no citations were provided to justify it.[15]

In its decision in SCE's TY 2012 GRC,[16] the Commission again declared "preponderance of the evidence" to be the standard, quoting from the Evidence Code definition of proof as "the establishment of evidence of a requisite degree of belief."[17] But nothing in that definition justifies lowering the standard of proof.

In this OII, the PD applies the same erroneous "preponderance of the evidence" standard. In so doing, it says that, "[d]espite [Alliance for Nuclear Responsibility's] reference to dated Commission decisions which use the term 'clear and convincing' this legal standard has been explicitly rejected by the Commission."[18] Certainly, the Commission "rejected" the clear and convincing standard in the SCE TY 2009 and 2012 GRCs, but it has never provided any legal analysis explaining why, as utilities' applications become more complex, their standard of proof should be lower.

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[13] D.04-07-022, p. 10.

[14] *Order Modifying Decision 08-01-058 and Denying Rehearing of Decision as Modified* (2008) D.08-12-058, mimeo, p. 3, emphasis added.

[15] D.09-03-025, mimeo, p. 8.

[16] *Decision on Test Year 2012 General Rate Case for Southern California Edison Company,* D. 12-11-051, mimeo, p. 9.

[17] D.12-11-051, p. 9.

[18] PD, p. 13.

The reasons the Commission gave when it held in 2000 that a clear and convincing standard should be applied to rate increase proceedings apply equally here. In D. 00-02-046, affirmed in D. 01-10-031, the Commission quoted from a treatise first published in 1926 which described the advantage utilities have in ratemaking litigation:

> Successful regulation of great public utility corporations, with their properties and their services ramifying in every direction, with vast revenues flowing in continuously, with nationwide alliances, and clearing-houses of technical information and expert service, is no simple and easy matter. The utilities …. stand ready to produce all the facts which they themselves declare to be pertinent and to explain them to the Commission, and to tell the Commission what its duty is.
>
> … If the Commission depends upon the consumers or the municipalities to present the public side of the controversy, the evidence in most cases will be heavily one-sided.
>
> … Financial resources, experience, inside knowledge, expert affiliations, great things at stake and continuity of interest, combine to give the utilities an overwhelming advantage in the presentation of their cases before Commission and Courts.[19]

In its 2000 decision, this Commission noted that the problems identified in 1926 – utility control through "inside" information and ratepayer funding of their efforts to "defeat the consumers" -- still exist.[20] In that decision, the Commission concluded that:

> The natural litigation advantage enjoyed by utilities, and the fact that we must rely in significant part on their experts, combine to reinforce the importance of placing the burden of proof in ratemaking applications on the applicant.[21]

Where, as here, the issue is not just a ratemaking application, but also a reasonableness review into technical decisions made about a nuclear plant, the natural litigation advantage of the utilities is especially pronounced.

Even the procedural history of this OII highlights complexity. For example, although the Commission opened the OII in November 2012, it was not until May 2013 that it became

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[19] D.00-02-046, p. 34.

[20] D.00-02-046, p. 35.

[21] D.00-02-046, p. 36.

apparent that "… SCE had identified 'Base' O&M [Operations and Maintenance] costs by timing each month, rather than by actual purpose of the expense."[22] And it was not until July 2013 that parties were provided with a "… revised breakdown of 2012 costs by month, segregated as to Base O&M and costs incurred as a result of the outages."[23] The numerous rounds of testimony, errata, supplemental testimony, and supplemental errata all highlight the fact that this is a specialized proceeding with complex issues that warrants the application of the clear and convincing standard of proof. The final decision in this Phase 1 proceeding should be amended to reflect that.

IV. FACTUAL AND TECHNICAL ISSUES

A. The Final Decision Should Amend the PD to Adopt a Mid-March 2012 Starting Point

The PD adopts a ramp down of 2012 Base-Routine O&M costs beginning with a 10% disallowance in June 2012 and ending with a 60% disallowance by December 2012.[24] The PD concludes that "[t]his amount approximately conforms with SCE's *unsupported* estimate that about one-third of SCE's Base-Routine O&M is necessary to maintain safe conditions and full regulatory compliance in a permanent shutdown mode."[25]

Given the PD's conclusion that SCE's estimate of Base-Routine O&M is "unsupported," the Commission should not rely on it as the basis for its Base-Routine O&M reduction. Since "SCE knew or should have known by March 15 [2012] that a potential design defect was present in both units",[26] the Base-Routine O&M cost ramp down should be calculated beginning in mid-March 2012, not June 2012. In addition, the PD concludes that "SCE understood that the units were likely to be offline for some time, because SCE developed a plan in March [2012] to postpone, cancel and reschedule capital projects and begin work on short term and long term repair options," which also supports a mid-March 2012 Base-Routine O&M ramp down calculation starting point.[27] The final decision should amend the PD to calculate the Base-

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[22] PD, p. 12.

[23] PD, p. 12.

[24] PD, at pp. 46-47, Appendix E.

[25] PD, at p. 47, emphasis added.

[26] PD at p. 37.

[27] PD, at p. 33.

Routine O&M cost ramp down beginning in mid-March 2012.

B. The Final Decision Should Amend the PD to Identify the Basis of Reasonable 2012 Capital Expenditure Adjustments

The PD states "[i]t is appropriate to reduce the amount of 2012 SONGS capital expenditures the Commission finds reasonable by 20% to reflect what the Utilities' internal experts determined were not necessary to safely maintain SONGS during the 2012 outage, in compliance with applicable federal and state regulations. Therefore, the Commission finds that only $134.08 million (80%) of 2012 total recorded capital expenditures ($167.6 million) are reasonable."[28] It is not clear from the discussion in the PD how the PD concludes that 20% is an appropriate adjustment to the 2012 SONGS capital expenditures. The final decision in this case should include an appropriate citation to the record if the Commission is to adopt the PD's 20% capital expenditure adjustment conclusion.

C. The Basis for the PD's Conclusion as to Capital-Related Expenses Derived From Rate Base Adjustments is Unclear

Regarding capital-related expenses derived from rate base adjustments, the PD states:

> The Commission finds that SCE's recorded rate base is excessive and should be reduced to reflect the changed conditions at the plant as the year progressed. The reduction should reflect removal of capital projects added to rate base in 2012 that do not compromise the safe operation of the plant in compliance with all regulatory requirements during the year. Therefore, it is reasonable to apply the 20% reduction adopted for capital expenditures to serve as a reasonable proxy for excess capital projects moved to rate base in 2012. The amount shall be removed from rate base and any associated revenue requirement found to be unreasonable for 2012.[29]

As with the 2012 capital expenditure adjustments discussed above in Section B, the final decision should clarify the basis of the conclusion that a 20% reduction to capital-related expenses derived from rate base adjustments is reasonable. The final decision should include an appropriate citation to the record in support of the PD's 20% capital-related expenses derived from rate base adjustments.

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[28] PD, p. 58.

[29] PD, p. 60.

D. Appendix G, "Results of Operations Model Output From SCE's GRC" Heading Should be Clarified

Appendix G of the PD is entitled the "Results of Operations Model Output, from SCE's 2012 GRC," but it appears to be a Results of Operations model output that incorporates the expense and rate base changes adopted by the PD. For clarity, Appendix G should be amended in the final decision to identify the PD's changes. ORA notes that the PD does not include an equivalent Results of Operations model output for SDG&E.

E. The PD Should Reduce SCE and SDG&E's SONGS-Related Administrative and General (A&G) Expense Recovery To Reflect the PD's O&M Ramp Down

Since Administrative & General (A&G) costs are typically dependent on O&M costs, the PD should reduce SCE's authorized SONGS-related A&G expenses by the same percentages adopted in the PD's O&M ramp down.[30] D.12-11-051, SCE's TY 2012 GRC decision, adopted total A&G expenses of $871.3 million.[31] SCE has not been tracking SONGS-related A&G expenses in the SONGSMA Monthly Reports.

The PD authorizes SDG&E's recovery of $60.492 million in SONGS-related costs not included in the SONGS portion of SCE's 2012 GRC or in SCE's OII testimony.[32] The $60.492 million in SONGS-related costs do not include SDG&E's SONGS-related A&G costs. D.13-05-010, the decision in the SDG&E/Southern California Gas TY 2012 GRC, authorized SDG&E's recovery of $1.847 million in SONGS-related A&G expenses.[33] Since A&G costs are typically dependent on O&M costs, the PD should reduce SDG&E's authorized SONGS-related A&G expenses by the same percentages adopted in the PD's O&M ramp down. SDG&E's Year End 2012 SONGSMA Report, attached to the PD as Appendix B, does not include an accounting of SDG&E's 2012 SONGS-related A&G expenses.

[30] PD at 46-47.

[31] D.12-11-051, Appendix C at C-13.

[32] PD at 66-67.

[33] D.13-05-010, Attachment B at B11, ln. 13.

VI. CONCLUSION

For all the foregoing reasons, ORA recommends the Commission incorporate the changes above into its final decision in Phase 1 of this OII.

Respectfully submitted,

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APPENDIX*

Proposed Additional Findings of Fact

32. In order to reasonably account for O&M costs incurred as a result of SCE's not well-considered decision to maintain all, or nearly all, operating staff through the end of 2012, O&M costs recoverable in rates should gradually decrease by **mid-March 2012.**

32.a. In order to reasonably account for A&G costs incurred as a result of SCE's not well-considered decision to maintain all, or nearly all, operating staff through the end of 2012, A&G costs recoverable in rates should gradually decrease by mid-March 2012.

Proposed (Additional) Conclusion of Law

1.a. The standard of proof applicable to this proceeding is "clear and convincing evidence."

6. Beginning in **mid-March 2012,** 10% of O&M shall be re-allocated to SGIR for further review as SGIR –related expenses in Phase 3, followed by 20% in July and so on until November and December 2012 when 40% of recorded O&M will remain in rates.

6.a. Beginning in mid-March 2012, 10% of A&G shall be re-allocated to SGIR for further review as SGIR –related expenses in Phase 3, followed by 20% in July and so on until November and December 2012 when 40% of recorded A&G will remain in rates.

***** ORA's recommended additions to the Findings of Fact and Conclusions of Law are in **bold** type.